U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 06Sep2002

Case No.: 2002-BLA-00021

In the Matter of

CHARLES J. HALON
Claimant

v.

READING ANTHRACITE COMPANY
Employer

and

LACKAWANNA CASUALTY COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Carolyn M. Marconis, Esq.
For Claimant

William E. Wyatt, Jr., Esq.
For Employer

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER DENYING REQUEST FOR MODIFICATION

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.* ("the Act"). The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons whose deaths were caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

ISSUES

The following issues are presented for adjudication:

1) whether the claimant is totally disabled,

2) whether the claimant's disability is due to pneumoconiosis,

3) whether the claimant has established grounds for modification pursuant to 20 C.F.R. § 725.310 (2000).[1]

PROCEDURAL BACKGROUND

The Claimant, Charles J. Halon, filed his initial claim for benefits under the Act on September 30, 1981. (DX 25).[2] This claim was administratively denied on March 10, 1982, and Claimant did not pursue this claim any further. Claimant filed his second claim for benefits on October 15, 1987. (DX 1). This claim was administratively denied on July 10, 1989. (DX 25). Claimant did not pursue an appeal of this claim.

Claimant filed another application for benefits on April 23, 1990. (DX 26). Since this claim was filed within one year of the previous denial, it was considered a request for modification. On September 14, 1990, the District Director denied Claimant's request for modification. (DX 44). Claimant subsequently requested a hearing before the Office of Administrative Law Judges ("OALJ"). (DX 51). On June 16, 1992, I issued a Decision and Order Denying Benefits. (DX 72). Although Claimant established the presence of pneumoconiosis, and that his pneumoconiosis was due to coal mine employment, he failed to establish that he was totally disabled due to a respiratory or pulmonary condition. After a remand by the Benefits Review Board ("the Board"), I issued a second Decision and Order Denying Benefits on August 25, 1994. (DX 75, 76). Again, I found that the evidence failed to establish that Claimant was totally disabled. On appeal, the Board affirmed this decision. (DX 82).

On November 19, 1995, Claimant filed a Petition for Modification. (DX 83). On February 14, 1996, the District Director issued a Proposed Decision and Order Denying Request for Modification.

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[1] This section applies since Claimant's application for benefits was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c) (2002). Procedurally, I am adjudicating a request for modification of the denial of a duplicate claim. Therefore, 20 C.F.R. §725.309 (2000) is also applicable to this case. Since this claim was filed subsequent to the effective date of the permanent criteria of Part 718, (i.e. March 31, 1980), the regulations set forth at 20 C.F.R. Part 718 (2002) will govern its adjudication.

[2] The following references will be used herein: "TR" for the hearing transcript, "DX" for Director's exhibit, "EX" for Employer's exhibit, and "CX" for Claimant's exhibit.

(DX 88). Claimant again requested a formal hearing before OALJ. (DX 89). On May 23, 1997, I issued a Decision and Order Denying Benefits since Claimant failed to establish that he was totally disabled. (DX 107). Claimant appealed this decision to the Board, which affirmed my decision on April 22, 1998. (DX 113).

Claimant filed another Petition for Modification on August 31, 1998. (DX 114). On December 22, 1998, the District Director issued a Proposed Decision and Order Denying Benefits. (DX 129). Claimant subsequently requested a hearing before OALJ. (DX 130). Administrative Law Judge ("ALJ") Ralph A. Romano issued a Decision and Order Denying Modification and Denying Benefits on March 15, 2000. (DX 144). ALJ Romano denied the request for modification since Claimant failed to establish that he was totally disabled.

The current proceeding arises from a Petition for Modification filed by Claimant on March 2, 2001. (DX 145). On June 29, 2001, the District Director issued a Proposed Decision and Order Denying Request for Modification. (DX 153). Claimant requested a hearing before OALJ. (DX 154). ALJ Ainsworth H. Brown conducted a hearing in Reading, Pennsylvania on March 11, 2002. At the hearing, ALJ Brown admitted Director's Exhibits 1 - 158, Claimant's Exhibits 1 and 2, and Employer's Exhibits 1 - 4. (TR 4-5).

On April 8, 2002, Claimant submitted his closing arguments. On April 29, 2002, Employer submitted its Proposed Decision on Behalf of Employer. On May 1, 2002, this case was assigned to me for appropriate disposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF THE EVIDENCE

A. CLAIMANT'S TESTIMONY

Claimant was born on January 15, 1923. (TR 7). He has no dependents for the purpose of benefit augmentation under the Act. It was previously established that Claimant worked as a coal miner for forty-two years. (DX 72). Claimant testified that his breathing problems have gotten worse since 1999. (TR 8). He stated that damp or cold weather makes breathing difficult, and he becomes short of breath after walking a block or climbing sixteen steps. (TR 9). Claimant is not bothered by a constant cough; he only experiences coughing when the weather is damp. (TR 10). He testified that he does not have any problems sleeping and does not take any medications for his breathing. Claimant underwent a quadruple coronary artery bypass in 1999, and currently takes medication for his heart. (TR 10, 15). He testified that he has not had any heart problems since his operation. Claimant smoked cigarettes for two years approximately

fifty years ago. (TR 11). Finally, Claimant testified that he is examined by Dr. Raymond Kraynak every two months. (TR 12).

B. MEDICAL EVIDENCE

1) Pulmonary Function Tests

The record contains the results of pulmonary function tests ("PFT") submitted in conjunction with Claimant's second claim for benefits and subsequent requests for modification. The results of these studies were described in my June 16, 1992, August 25, 1994, and May 23, 1997 decisions, and ALJ Romano's March 15, 2000 decision; I incorporate these descriptions herein by reference. In addition, after reviewing these decisions, I also adopt the previous determinations that these PFTs are valid. The parties submitted additional PFTs in association with Claimant's current request for modification. The results of these PFTs are as follows:[3]

EXHIBIT	**DATE**	**DOCTOR**	**AGE**	**FEV1** PRE/POST	**FVC** PRE/POST	**MVV** PRE/POST	**FEV1/FVC** PRE/POST	**QUALIFY** PRE/POST
CX 1	2/14/02	R. Kraynak	79	2.56	3.11	70	82%	NO
EX 1	6/8/01	Dittman	78	2.23 / 2.20	2.64 / 2.66	59.27 / 53.85	84% / 83%	NO / NO
DX 149	6/1/00	R. Kraynak	77	1.22	1.75	45	69%	YES

PFTs administered prior to January 19, 2001 must be in substantial compliance with the quality standards of 20 C.F.R. Part 718 (2000). *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987);[4] 20 C.F.R. §718.101(b). Tests administered after January 19, 2001 must substantially comply with the revised quality standards contained in §718.103 and Appendix B to Part 718. 20 C.F.R. §718.101 (2002). In making this determination, I must consider the medical opinions of record regarding the reliability of each test. *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-133 (1986). Except in limited circumstances, a PFT that is not in substantial compliance with the applicable quality standards may not constitute evidence of the presence or absence of a pulmonary or respiratory impairment. *See* 20 C.F.R. §§718.101(b), 718.103(c) (2002); 20 C.F.R. §718.103(c) (2000); 65 Fed. Reg. 79920, 79927 (December 20, 2000).

[3] If a bronchodilator was administered at the time of the PFT, both pre- and post-bronchodilator results are noted. "Qualifying" values are those which meet the criteria for total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i).

[4] This case is within the jurisdiction of the U.S. Court of Appeals for the Third Circuit since the miner's last coal mine employment took place in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Drs. Sander Levinson, Robin Kaplan, and Jonathan Hertz reviewed Claimant's June 1, 2000 PFT. All three physicians stated that the study is invalid. (DX 149). Dr. Levinson invalidated the study since the "entire FVC curve was not displayed" and there was "poor effort on the MVVs." (DX 149). Dr. Kaplan opined that since a precise zero point was not established on the forced expiratory tracings, there is a "doubt as to the completeness of the recording." (DX 151). The physician also stated that the study is deficient due to "the variable effort by the Claimant, as demonstrated by the irregular contours of the tracings during the most effort-dependent portion of the maneuver, the first second." Dr. Hertz stated, "[t]he spirometry tracings waver, are irregular, and demonstrate the [claimant] did not use maximal effort during the entire forced expiration." (DX 152). He also stated that one of the three spirometry tracings cannot be seen in its entirety. According to Dr. Hertz, "[t]he MVV maneuvers show wavering and excessive fluctuation, particularly over the last 3-4 seconds, and demonstrate that the patient did not maintain maximal and consistent effort for at least 12 seconds." Dr. Raymond Kraynak reviewed this study and opined that it is valid. (CX 2 at 11). Dr. Kraynak specifically opposed each statement made by Drs. Levinson, Kaplan, and Hertz. (CX 2 at 11-13). Drs. Levinson, Kaplan, and Hertz are board certified in internal and pulmonary disease medicine. (DX 150, 151, 152). Dr. Kraynak is board eligible in family medicine. (CX 2 at 4). I credit the opinions of Drs. Levinson, Kaplan, and Hertz over that of Dr. Kraynak based on their superior qualifications. *See Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-40 (1990). Accordingly, I find that Claimant's June 1, 2000 PFT does not substantially comply with the applicable quality standards. *See* 20 C.F.R. pt. 718, app. B, § (2) (2000).

Dr. Thomas Dittman reviewed Claimant's June 8, 2001 study and stated that Claimant's effort was "inconsistent and less than maximum." (EX 1). He added, [t]his will falsely lower the results obtained and lessen the reliability of the testing for accurate assessment of actual lung function." Dr. Dittman is board certified in internal medicine. (EX 2). Dr. Kraynak reviewed this study and stated that it is valid. (CX 2 at 9). According to Dr. Kraynak, "the two largest FEV1s vary by less than 5 percent and 100 milliliters," the flow loops show "excellent effort throughout," and the MVV tracings show "good effort throughout." Although Dr. Dittman's qualifications are superior to those of Dr. Kraynak – and therefore I accept his opinion on Claimant's efforts – Dr. Dittman did not specifically state that study is invalid or unacceptable. Therefore, I find that Claimant's June 8, 2001 PFT substantially complies with the Part 718 quality standards.

Dr. Levinson reviewed Claimant's February 14, 2002 PFT and opined that it is invalid. (EX 4). Dr. Levinson stated, "[t]he effort expended by the [claimant] is unacceptable . . . each and every forced vital capacity effort is lacking in that exhalation has not been preceded by a maximum inhalation." He continued, "[t]here is a marked abrupt discontinuation of inhalation and exhalation indicating that the [claimant] has not exerted a maximal sustained inhalation prior to the exhalation effort." Finally, Dr. Levinson opined that the MVV curves indicate that Claimant did not exert a maximal and sustained effort for twelve to fifteen seconds as required by the Part 718 regulations. Based on the opinion of Dr. Levinson, I find that this study does not substantially comply with the applicable quality standards. *See* 20 C.F.R. pt. 718, app. B, § (2) (2002).

2) Arterial Blood Gas Studies

The record contains the results of arterial blood gas ("ABG") studies submitted in conjunction with Claimant's second claim for benefits and subsequent requests for modification. The results of these studies were described in my previous decisions, and ALJ Romano's March 15, 2000 decision. I incorporate these descriptions herein by reference. Employer submitted the results of an ABG administered in association with Claimant's current request for modification:[5]

EXHIBIT	**DATE**	**pCO2** PRE/POST	**pO2** PRE/POST	**QUALIFY**
EX 1	6/8/01	36	81	NO

3) Medical Opinions[6]

The record contains medical opinions submitted in conjunction with Claimant's second claim for benefits and subsequent requests for modification. These opinions were adequately described in my previous decisions, and ALJ Romano's March 15, 2000 decision; I incorporate these descriptions herein by reference.

Employer submitted a June 20, 2001 report from Dr. Thomas Dittman based on his examination of Claimant on June 8, 2001. (EX 1). The physician stated that Claimant complained of shortness of breath and tightness in his chest upon walking two blocks or climbing ten steps. He also complained of an occasional cough that is rarely productive of sputum. Claimant denied hemoptysis, wheezing, and paroxysmal nocturnal dyspnea, but complained of two pillow orthopnea. Dr. Dittman noted that Claimant underwent a quadruple bypass in 1999. Claimant informed Dr. Dittman that he never smoked, but chewed ½ pack of tobacco per day in the past. Claimant told Dr. Dittman he worked in coal mines as a greaser, driller's helper, laborer, and rock picker from 1942 to 1988. Dr. Dittman noted that Claimant's last coal mine job was as a greaser and engine man; his primary duties were to lubricate heavy equipment. Dr. Dittman administered a physical, X-ray, PFT, ABG, and EKG the day he examined Claimant. Dr. Dittman noted that Claimant's lungs were normal to inspection, palpation, and percussion, and no wheezes, rhonchi, rales, or rub were present. He also noted that Claimant's extremities were normal. Claimant's X-ray was interpreted by Dr. Joseph Ciotola as negative for pneumoconiosis. Dr. Dittman stated that Claimant's PFT

[5] The studies were administered at less than three-thousand feet and the values are indicated pre- and post-exercise. "Qualifying" values for ABGs are those which are at or below those specified in Appendix C to Part 718.

[6] The revised Part 718 regulations contain specific quality standards for medical opinion evidence developed after January 19, 2001 that were not previously required. A report of a physical examination conducted in connection with a claim must be in substantial compliance with the requirements of §718.104 in order to constitute evidence of the fact for which it is proffered. *See* 20 C.F.R. §§718.101(b), 718.104(a) (2002).

results showed a mild restrictive defect – but they must be considered in light of Claimant's "less than adequate effort for the testing." Claimant's ABG revealed normal values. Dr. Dittman concluded that Claimant "does not have coal worker's pneumoconiosis and is not physically impaired nor disabled on the basis of coal worker's pneumoconiosis." He continued, "[e]ven if it was to be assumed that the [claimant] did have simple coal worker's pneumoconiosis, it would be my opinion that he is not physically impaired nor disabled on the basis of this disorder." Dr. Dittman also diagnosed Claimant with coronary artery disease and atherosclerotic vascular disease.

Dr. Dittman gave a deposition in this matter on January 25, 2002. (EX 3). For the most part, Dr. Dittman simply recounted the findings contained in his June 20, 2001 report. However, he did opine that Claimant is disabled due to his heart condition. (EX 3 at 15). Dr. Dittman also testified that – from a pulmonary standpoint – Claimant would be able to perform his usual coal mine employment. (EX 3 at 16).

Claimant submitted an opinion from Dr. Raymond Kraynak, who testified in a deposition on March 1, 2002. (CX 2). Dr. Kraynak stated that he has seen Claimant every 1 - 2 months since 1990. (CX 2 at 5-6). He testified that, since 1999, Claimant has complained of shortness of breath, productive cough, and difficulty walking more than "half [a] block or up several steps without stopping to regain his breath." (CX 2 at 6). According to Dr. Kraynak, these complaints have worsened since 1999. He specified that when he first started treating Claimant, Claimant could walk one to two blocks or up a flight of steps before experiencing breathing difficulties. Dr. Kraynak's physical examinations have revealed that Claimant's lips are cyanotic, his lungs show scattered wheezes, but his heart rate and rhythm are normal. (CX 2 at 10). Dr. Kraynak stated that Claimant has no history of tobacco abuse, and he was employed in the anthracite coal industry for "over 25 years."[7] (CX 2 at 7). Since 1999, Dr. Kraynak has reviewed Claimant's June 1, 2000, June 8, 2001 and February 14, 2002 PFTs; Claimant's June 8, 2001 ABG; Dr. Dittman's June 20, 2001 report; and a June 8, 2001 X-ray interpreted by Dr. Ciotola as negative for pneumoconiosis. (CX 2 at 8-9). Dr. Kraynak opined that Claimant's June 8, 2001 PFT showed "a severe restrictive defect," and his February 14, 2002 PFT showed a "severe airflow defect." (CX 2 at 9, 16). Dr. Kraynak testified that Claimant suffers no disability due to his cardiac condition. (CX 2 at 11, 15). Finally, Dr. Kraynak stated that Claimant has pneumoconiosis due to coal mine employment and "is totally and permanently disabled due to coal worker's pneumoconiosis." (CX 2 at 11).

II. DISCUSSION

Entitlement to benefits depends upon proof of four elements. A claimant must establish that: (1) he has pneumoconiosis, (2) his pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his pneumoconiosis contributed to the total disability. 20 C.F.R. §725.202(d) (2002). Failure to

[7] Later in his deposition, Claimant's counsel reminded Dr. Kraynak that Claimant has been credited with forty-two years of coal mine employment. (CX 2 at 22). Dr. Kraynak stated that would not change his opinion, "but it would substantiate my opinion that . . . it would be more probable that a gentleman who has over 40 years of exposure would have disability than someone who has less."

prove any of these requisite elements by a preponderance of the evidence precludes a finding of entitlement. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Given the procedural posture of this case, I must consider the evidence admitted since Claimant's second claim for benefits and determine whether it establishes that he is totally disabled. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317 (3d Cir. 1995); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1993).

Total disability may be proven by: 1) PFTs which reveal a qualifying value for the FEV1 test, plus either a qualifying value for the FVC test, or the MVV test, or the result of the FEV1 divided by FVC is less than or equal to 55%; or 2) ABGs which reveal qualifying values; or 3) medical evidence of cor pulmonale;[8] or 4) a reasoned medical opinion which concludes total disability, if the opinion is based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R § 718.204(b)(2)(i)-(iv) (2002). The ALJ must weigh all relevant evidence together in determining whether a claimant has proven that he is totally disabled. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-23 (1999).

None of the previously submitted ABGs, or conforming PFTs, revealed qualifying results. I also reviewed my own – as well as ALJ Romano's – analysis of the medical opinion evidence submitted since Claimant's second claim for benefits. I conclude that the previously submitted medical opinion evidence does not establish that Claimant is totally disabled due to a respiratory or pulmonary condition.

Of the recently submitted evidence, Claimant's ABG – and the only conforming PFT – did not reveal values qualifying for total disability. Dr. Dittman opined that Claimant is not totally disabled by a respiratory or pulmonary impairment. After reviewing his report, I find that it satisfies the requirements of 20 C.F.R. §718.104(a) (2002). Furthermore, since Dr. Dittman's opinion is documented and adequately supported by the medical evidence he relied upon, I find that it is reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Dr. Kraynak opined that Claimant is totally disabled due to a respiratory or pulmonary impairment. Although I consider Dr. Kraynak's opinion reasoned, *see Fields*, 10 BLR at 1-22, I accord Dr. Dittman's opinion significantly more weight for a number of reasons. First, Dr. Dittman's qualifications are superior to those of Dr. Kraynak. *See Burns v. Director, OWCP*, 7 BLR 1-597, 1-599 (1984). Second, Dr. Kraynak's assertion that Claimant's condition has worsened since 1999 is inconsistent with Dr. Kraynak's previous – and Claimant's current – testimony. Dr. Kraynak stated that Claimant complained of only being able to walk "half [a] block or up several steps without stopping to regain his breath." At his deposition in 1999, Dr. Kraynak testified that Claimant had "difficulty walking a distance of approximately a half a block or up several steps without stopping to regain his breath." (DX 134 at 6). Furthermore, at his hearing before ALJ Brown, Claimant testified that he experiences breathing

[8] None was submitted in the present claim.

difficulties after walking one block or climbing sixteen steps. Dr. Kraynak also stated that, during his physical examinations of Claimant, he has noticed "cyanotic" lips and "scattered wheezes." Dr. Dittman's
examination of Claimant on June 8, 2001 revealed Claimant's extremities and lungs were normal. Finally, the only conforming PFT that Dr. Kraynak relied upon was Claimant's June 8, 2001 PFT. Dr. Kraynak stated that this study showed "a severe restrictive defect." Dr. Dittman – who possesses superior qualifications – stated that the results showed only a "mild restrictive defect." Moreover, Dr. Kraynak's opinion that Claimant's June 8, 2001 PFT results showed a "severe restrictive defect" is undermined by Dr. Dittman's opinion that Claimant's efforts on this PFT were not adequate, and the results are "falsely lower" as a result.

Since Dr. Kraynak is Claimant's treating physician, I must determine if this entitles his opinion to "controlling weight" in this matter. *See* 20 C.F.R. §718.104(d) (2002). Dr. Kraynak has treated Claimant every 1 - 2 months since 1990 for his breathing problems. Dr. Kraynak has also conducted numerous diagnostic tests on Claimant since 1990. However, the great weight of the record evidence does not support Dr. Kraynak's opinion that Claimant is totally disabled. Therefore, I decline to give his opinion controlling weight on the issue of total disability. *See* 20 C.F.R. §718.104(d)(5) (2002).

After considering the previously submitted evidence in conjunction with the newly submitted evidence, I find that Claimant has not established that he is totally disabled due to a respiratory or pulmonary condition.

III. CONCLUSION

Since Claimant has not proven that he is totally disabled due to a pulmonary or respiratory condition, he is not entitled to benefits under the Act.

ORDER

Charles J. Halon's request for modification of the denial of benefits is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to him in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F. R. §725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.